LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 22 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1351

ROSEMARY C. MOGGE and OFFICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 28, AFL-CIO,

Petitioners,

VS.

DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BARNABAS F. SEARS,
JAMES N. KOSMOND,
33 N. LaSalle Street,
Chicago, Illinois 60602,
Attorneys for Petitioners.

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3966

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
1. Factual Background	4
2. The Collective Bargaining Agreement of January 1, 1964	5
3. Rosemary Mogge's Discharge	7
4. District No. 8's Repudiation of the Agreement	10
5. The Complaint Filed	11
6. Motion to Dismiss or Stay Proceedings	12
7. Subsequent Proceedings	16
Reasons For Granting The Writ	18
Conclusion	29
Appendices:	
A—(Opinion of the District Court)	1a-2a
B—(Opinion of the Court of Appeals)	3a-7a
C—(Judgment of the Court of Appeals)	8a
D—(Order Denying Petition for Rehearing)	9a
E—(Statutes Involved)	10a-12a

List Of Authorities Cited

Cases:

Anderson v. M. Burg & Sons, 170 Minn. 53; 212 N.W. 9, 11 (1927) 21
Berry v. Carter, 19 Kan. 135, 139 (1877) 20
Bertero v. Superior Court, 30 Cal. Rptr. 719; 216 Cal. App. 2d 213, 218 (1963) 20
Calhoun Deeny & Ewing v. Pederson, 85 Wash. 630; 149 P. 25, 26 (1915) 21
Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N.W. 524, 525 (1910) 21
Drake Bakeries, Inc. v. Local 50, 287 F. 2d 155 (2nd Cir. 1961); 294 F. 2d 399 (2nd Cir. 1961); Cert. granted 370 U.S. 254, 8 L. Ed. 2d 474 (1962) 16, 18, 25, 27
El Paso Bldg. & Const. v. El Paso Chap. Assoc. Gen. Con., 376 F. 2d 797, 799 (1967) 20
General Electric Company v. Local 205, etc., 233 F. 2d 85, 98 (1st Cir. 1956) Cert. granted 353 U.S. 547, 1 L. Ed. 2d 1028 27
Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978 at 989 (2nd Cir. 1942) 28
Lane, Ltd. v. Larus & Brother Co., 243 F. 2d 364, 367 (2nd Cir. 1957) 21
Lincoln Mills of Alabama v. Textile Workers Union, 230 F. 2d 81, 86 (5th Cir. 1956) Cert. granted 353 U.S. 448, 1 L. Ed. 2d 972 (1957) 26-27, 28
Local No. 149 v. General Electric Company, 250 F. 2d 922, 927 (1st Cir. 1957); cert. denied 356 U.S. 938; 2 L. Ed. 2d 813 27

Mapes v. Metcalf, 10 N.D. 601, 88 N.W. 713, 717 (1901) 21
Nachman v. Nachman, 177 N.Y.S. 2d 323, 324, 12 Misc. 2d 551 (1958) 21
Packinghouse Workers v. Needham Packing Co., 376 U.S. 247, 251; 11 L. Ed. 2d 680, 683 (1964) 16, 25
Pellicano v. Hartford Fire Ins. Co., 211 Minn. 314, 1 N.W. 2d 354, 355 (1941) 21
Pietro Scalzitti v. Int'l. Union of Operating Engineers, 351 F. 2d 576, 579-580 (7th Cir. 1965) 28
United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 566-568; 4 L. Ed. 2d 1403 25
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-584; 4 L. Ed. 2d 1409 25
Vaca v. Sipes, 386 U.S. 171, 185; 17 L. Ed. 2d 842, 855 (1967) 18
Willett v. Smith, 214 Mass. 494; 101 N.E. 1058, 1059 (1913) 21

Others:

National Labor Relations Act, §301(a) 18
6A Corbin, Contracts, Section 1443 (1962) at pages 434-435 18-19
9 U.S.C. §1 ..... 11a
9 U.S.C. §3 ..... 12a
28 U.S.C. 2201 et seq. 20
29 U.S.C. §185 ..... 24, 10a
64 ALR 2d 1336, 1343-1348 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

ROSEMARY C. MOGGE and OFFICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 28, AFL-CIO,

Petitioners,

VS.

DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 26, 1967. The Court of Appeals affirmed the District Court's granting of Respondent's alternative motion to stay, pending arbitration, Petitioners' suit for damages under Section 301(a) of the National Labor Relations Act, as amended.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Illinois, Eastern Division, filed on April 21, 1967, was not reported. It is set forth in Appendix A, *infra* pp. 1a-2a. The opinion of the Court of Appeals for the Seventh Circuit, filed on December 26, 1967, is set forth in Appendix B, *infra* pp. 3a-7a, and reported at 387 F. 2d 880.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 26, 1967 (Appendix C, *infra* p. 8a). On January 23, 1968 the Court of Appeals denied petitioners' Petition for Rehearing (Appendix D, *infra* p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. May a party to a collective bargaining agreement, after having acknowledged the agreement, when asked to arbitrate thereunder disclaim the agreement and repudiate its arbitration provisions, in violation of the national labor policy, thereafter stay for arbitration a suit for damages filed in reliance upon the repudiation, under Section 301(a) of the National Labor Relations Act?

2. Whether the Supreme Court should exercise its supervisory powers to review a decision of the Court of Appeals based upon findings wholly unsupported by any evidence?

3. Whether the United States Arbitration Act applies to cases arising under Section 301(a) of the National Labor Relations Act? If so, is the respondent in default within the meanings of its terms? If not, what are the applicable standards under the substantive law of Section 301(a) for seeking arbitration after having previously refused same, and may the respondent herein stay for arbitration petitioners' suit for breach of damages?

STATUTES INVOLVED.

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and Sections 1 and 3 of the United States Arbitration Act, 9 U.S.C. §1 and §3 are involved herein. They are set out in full in Appendix E, *infra* pp. 10a-12a.

STATEMENT.

1. Factual Background

In August, 1950, petitioner-plaintiff Mogge was employed by the respondent-defendant as a stenographer-secretary for two days a week. In early 1951, she commenced working three days a week. In the spring of 1952 she started working five days a week (A. 29-30). Upon the retirement of Lois Brooks in October, 1959, Mrs. Mogge was promoted to the job classification of Administrative Secretary, formerly held by Mrs. Brooks. Her salary was increased to that which the former Administrative Secretary had been receiving (A. 30, 50-51).

On February 1, 1963, Mrs. Mogge began a six-month maternity leave of absence. Prior to this time, Doris Farley was hired as a stenographer-typist. On August 1, 1963, Mrs. Mogge returned to work three days a week at an adjusted salary. She worked every Monday, Wednesday and Thursday. Doris Farley worked every Tuesday, Thursday and Friday (A. 17, 31, 54).

Mr. James G. McDonald had been the executive head of District No. 8 since July, 1945 (A. 153). In his capacity as Directing Business Representative Mr. McDonald handled the administrative operation of the defendant union (A. 33). In such position, he entered into various agreements and contracts on behalf of the District. These included the execution of leases, contracts for purchase of furniture and fixtures, and various other matters arising in the administration of the District. He had the authority to hire and fire union

organizers (A. 33). The present Directing Business Representative described the job as "running the affairs of District No. 8" (A. 155).

Plaintiff Mogge attended the meetings of the District Council of defendant union as the reporter. Although wage increases and expenditures would be mentioned at District Council meetings Mrs. Mogge had no knowledge of any requirement that the council had to formally approve them. Rather, such matters were brought out informally by Mr. McDonald (A. 33, 56).

The petitioner-plaintiff union, Office Employees' International Union, Local 28, AFL-CIO, had been representing the office employees of the defendant since at least 1944, when Sarah E. Keenan was elected the Business Representative (A. 36-37, 74-75). From some time prior to 1944, until January 1, 1964, an oral collective bargaining agreement had existed between plaintiff union and defendant (A. 36-37).

Mr. McDonald conducted all negotiations on behalf of the defendant with the plaintiff union from 1945 to February, 1965 (A. 37). He had made various agreements and commitments on behalf of defendant, with plaintiff union, concerning terms and conditions of employment of the employees in the unit (A. 37). Any such agreement made with him, or commitment from him, was fulfilled (A. 32).

2. The Collective Bargaining Agreement of January 1, 1964

In the fall of 1963, the four office employees in the unit agreed to seek a written contract embodying their present terms and conditions of employment (A. 31-32,

37-38, 69-70). Mrs. Mogge and another of employees met on several occasions with Local 28's Business Representative, Sarah Keenan, regarding this matter (A. 32, 37).

This culminated in a meeting later in December, 1963, between Miss Keenan, Mrs. Mogge and James G. McDonald. Mr. McDonald agreed to the employees' request to have the oral collective bargaining agreement reduced to writing. Shortly thereafter, Mrs. Mogge typed the contract (A. 32, 37-38, 70). The agreement was then examined and approved by all employees in the unit including Mrs. Farley (A. 32). The written contract merely codified the oral agreements between plaintiff union and defendant employer. There were no additional economic benefits, nor were there any changes in terms and conditions of employment (A. 32, 37, 82-83). The contract (A. 8-17) was signed in the office of Local 28 on January 2, 1964 (A. 32, 38, 69, 75).

The agreement provided in Article III, Section 1, that the defendant accepted the job classifications set out in Schedule C attached to the agreement (A. 8). Schedule C provided for four job classifications: Administrative Secretary, Steno-Secretary, Steno-Typist and Switchboard-Typist (A. 17).

It further provided in Article III, Section 2: "Whenever a new job is created, or the contents of any job changes, the employer agrees to meet with the Union Committee to discuss the new classification or changes in the existing job." (A. 9).

In Article VI, Section 7, the Agreement provided: "Employees employed by the Employer at the execution date of this Agreement, and employees hired to fill a perma

nent position covered by this Agreement, may not be dismissed, suspended or demoted without just and sufficient cause, except as provided in Section 2 above." (A. 11).

Attached to and made a part of the Agreement (A. 17) was a "Letter of Understanding" dated January 1, 1964, which in part provided: "It is understood and agreed between District No. 8, International Association of Machinists, known as the Employer, and the Office Employees' International Union, Local 28, known as the Union, that the Administrative Secretary, Rosemary Mogge, shall work three days per week * * * at the salaries stipulated in Schedule "B" of this Agreement. In the event Rosemary Mogge shall return to her original five-day week, her salary shall be reinstated to $185.00 per week."

The Agreement also contained "Grievance & Arbitration Machinery" in Article XIII as follows (A. 14):

> "* * * When an employee has a grievance, he or she shall first make an effort to arrive at a satisfactory settlement through the Union Steward. In the event the grievance is not settled in this manner, the Executive Officer of the Employer will be consulted by the Union Business Representative, or her agent. If the grievance still exists, within ten (10) calendar days the matter may be submitted to arbitration."

3. Rosemary Mogge's Discharge

In February of 1965 Mr. McDonald resigned because of ill health (A. 33). On or about February 1, 1965, at the request of the district delegates of District No. 8, the Grand Lodge of the International Association of Machinists assumed supervision of the District. Mr. Eugene

Glover, a Grand Lodge Representative, was appointed by the International President to assume control of District No. 8. His title was Deputy Supervisor (A. 199-204).

On April 5, 1965, Rosemary Mogge was told by Mr. Glover that he had decided to eliminate her job classification of Administrative Secretary and that she had been reclassified as a stenographer. She was further told to report for work five days a week commencing with the week of April 12, 1965. Mrs. Mogge told him he could not take this action without negotiating with the plaintiff union and that she would discuss the matter with Miss Keenan (A. 34, 62-66, 217-218).

In the deposition of Eugene D. Glover, taken March 14, 1966, he testified that he told plaintiff Mogge on April 5, 1965: "We will make some kind of arrangement, whatever you can, and you report in next month. You do not have to report in right away, but next month you report in on a five-day week." (A. 217-218). However, he later said in his deposition that he did require her to work five days a week starting April 12, 1965 (A. 227, see also his letter of April 13, 1965, A. 19).

After her conversation with Mr. Glover, Mrs. Mogge then called Sarah Keenan to report this action. Miss Keenan attempted to call Mr. Glover, and was informed that he had left town and would not be back until Monday, April 12, 1965 (A. 38).

Thereafter, on April 7, 1965, Miss Keenan sent a letter by certified mail to Mr. Glover at the office of District No. 8 requesting a meeting "on Monday, April 12, or as soon thereafter as possible." Miss Keenan further stated in the letter: "This meeting is requested as there has been

a threatened violation of our agreement. (The agreement is dated January 2, 1964.)" The letter also requested that the working conditions of the union members in the employ of defendant remain in status quo until after a meeting is held and the results evaluated (A. 38-41).

On April 12, 1965 a meeting was arranged. Miss Keenan and Mrs. Mogge met with Mr. Glover and Mr. Gray for almost four hours. During the meeting, Mr. Glover stated that he would not negotiate with the union on the change in Mrs. Mogge's job classification from Administrative Secretary to stenographer, nor would he negotiate the requirement that she work five days a week instead of three. Miss Keenan and Mrs. Mogge were advised by Mr. Glover that he was not going to have the office workers telling him how to run the office. Mr. Glover insisted that Mrs. Mogge report for work on April 13, 1965, a day she would normally be off from work, or she would be subject to disciplinary action. Thereafter, when Mrs. Mogge did not report for work on April 13th, she received a telegram from Mr. Glover (A. 18) advising that she had been "terminated for insubordination." (A. 34-35, 39, 66-68, 85-89).

On the same day, April 13th, plaintiff union by telegram to the defendant employer submitted the grievance of Rosemary Mogge to arbitration under Article XIII of the Agreement (A. 231-232).

Thereafter plaintiffs received a letter from defendant over the signature of Mr. Glover, dated April 13, 1965. It was directed to plaintiff union with a copy to plaintiff employee (A. 19-20). It acknowledged that a hearing had been held on a grievance filed by Mrs. Mogge. It then went on to state:

"Mrs. Mogge contended that District No. 8, International Association of Machinists was violating the Contract between the parties by assigning her to work five days per week and relieving her of her duties as 'Administrative Secretary'.

"On Monday, April 5, 1965, Mrs. Mogge was instructed by Grand Lodge Representative Glover that she would no longer be required to perform the duties of 'Administrative Secretary'; and further, that she would be required to report for work five days per week commencing Monday, April 12, 1965.

"District No. 8, I. A. of M. contends that the Contract allows the employer to assign or relieve employees of duties as well as require employees to work a regular five-day week."

The letter concluded by asserting that there was no violation of the agreement, and accordingly denied the grievance (A. 19-20).

4. District No. 8's Repudiation of the Agreement

On April 15, 1965 another letter was sent by the defendant over the signature of Mr. Glover to plaintiff union. It stated (A. 21):

"This will acknowledge receipt of your telegram dated April 13, 1965, advising me that O.E.I.U. Local No. 28 is submitting a Grievance to arbitration under Article XIII of an alleged Agreement between O.E.I.U. Local 28 and District No. 8, International Association of Machinists.

"Be advised that since our discussion concerning the legality and enforceability of the alleged contract on April 12, 1965, we have sought advice of counsel

and have been advised that there is no valid contract in existence between O.E.I.U. Local No. 28 and District No. 8, International Association of Machinists and that the purported Agreement on which you rely is not binding on District No. 8, International Association of Machinists.

"In view of the above, be further advised that since there is no Agreement to arbitrate in effect between the parties, we cannot agree to submission of the Grievance in question to arbitration."

On April 21, 1965, the plaintiff union again formally requested arbitration by correspondence to the defendant (A. 23). On April 22, 1965, a ten-minute meeting was held between Miss Keenan, Mrs. Mogge, Mr. Glover and a Mr. Gray at defendant's office. Mr. Glover advised that the defendant had refused plaintiff union's further request for arbitration dated April 21, 1965, and reiterated defendant's position that the written Collective Bargaining Agreement was invalid (A. 35-36, 39-40, 89-91).

5. The Complaint Filed

On October 15, 1965, plaintiffs filed the Complaint below. It alleged that contrary to the terms and conditions of the said Agreement, on April 5, 1965, the action of the defendant, in eliminating the job classification of Administrative Secretary, reclassifying plaintiff employee as a stenographer, and ordering her to report for work five days a week commencing April 12, 1965, was a unilateral change of an existing job classification in violation of Article III, Sections 1 and 2. It also alleged that such conduct violated Article VI, Section 7, in that the plaintiff employee was demoted without just and sufficient cause,

and further violated the "Letter of Understanding" made a part of the Agreement (A. 4-5).

The Complaint further alleged that the defendant otherwise breached the Collective Bargaining Agreement by refusing to enter into arbitration under Article XIII of the Agreement pursuant to plaintiff union's requests of April 13, 1965 and April 21, 1965 (A. 5-6). It also alleged that the defendant persisted in its refusal to submit to arbitration, by reason of the alleged invalidity of the contract, up to the time of the filing of the Complaint (A. 6). It further alleged that by reason of defendant's breach of the Agreement and wrongful discharge of Plaintiff Mogge, monetary damages have been suffered (A. 6-7).

6. Motion to Dismiss or Stay Proceedings

On December 20, 1965, the defendant filed a motion to dismiss or stay proceedings (A. 23-27). Attached to this motion were the affidavits of Russell Oddo, the present Directing Business Representative of defendant union, and Doris Farley. The alleged invalidity of the contract appeared to be based upon two grounds.

The first was that "The governing board of District No. 8 is the District Council, and it must approve all contracts and expenditures of the District"—that since the Collective Bargaining Agreement between plaintiff union and defendant was not approved by the District Council, the Directing Business Representative did not have the authority to execute the Agreement, and therefore it was not binding on the defendant. While the motion itself infers that this approval was required by the By-laws of the District, it is not specific as to the nature

of the requirement under which the Agreement should have been approved by the District Council (A. 23-24).

The support for this position was primarily based upon the affidavit of Russell Oddo, the present Directing Business Representative of defendant union. Mr. Oddo averred that in his capacity as Directing Business Representative of the defendant union, he has custody of its records and full knowledge of its affairs. Mr. Oddo stated that the By-laws of District No. 8, as well as the Constitution of the International Association of Machinists, require that all contracts be submitted to the District Council of defendant union for approval. He further averred that he had attended all meetings of the District Council and examined the official minutes of such meetings, and that they fail to disclose that the contract was ever submitted to the council for approval (A. 26-27).

No copies of either the By-laws of defendant union, the Constitution of the International Association of Machinists, or minutes of the District Council were attached as exhibits to the Motion to Dismiss. Nor was there mentioned what policy or customary practice, if any, required the submission of Agreement to the District Council for approval.

However, in Mr. Oddo's deposition, taken March 1, 1966, he testified that the provision of the By-laws that he referred to in his affidavit was Article II, §3 (A. 183-186). That provided as follows:

> "Section 3: Secretary and Duties: A Business Agent shall act as Secretary and shall keep a correct record of the reports submitted by the Chairman. He shall also submit the records of each meeting to the District Lodge at its succeeding meeting." (A. 185)

Mr. Oddo also identified the section of the Constitution of the International Association of Machinists that he had reference to in his affidavit as Article 24, Section 11 (A. 183-184, 186-187). That provision was as follows:

> "Management, Investment and Disbursement of District Lodge Funds or Property:
>
> Section 11. The funds, property or assets of District Lodges shall not be loaned or appropriated for any other than the legitimate purposes of the I. A. M.
>
> "Expenditures or contemplated expenditures in violation of this Sec. shall be cause for any action deemed necessary by a Grand Lodge officer to fully protect such funds, property or assets of the District Lodge." (A. 186-187)

In his deposition Mr. Oddo said that he also had reference in his affidavit to the fact that customary practice would require the Agreement to be approved by the District Council (A. 183, 185). Mr. Oddo explained this practice to be that, "any wage increases for business agents, office employees, has (sic.) always been brought before the District Council to be approved." (A. 190-191) Mr. Oddo knew that there was a verbal agreement or understanding between plaintiff union and defendant prior to the written agreement (A. 173). Regarding the authority of business agents to execute contracts or collective bargaining agreements he said, ". . . any business agent that signs a contract—it becomes a legal document. It binds both parties" (A. 173).

Mr. Glover further said that much of the authority of Directing Business Representatives arises from customary practice, as opposed to specified authority (A. 247). He was not familiar with the customary practice of District No. 8 prior to February 1, 1965 (A. 248).

The second apparent ground in the Motion for claiming the Agreement to be invalid was the assertion that it was not signed on January 2, 1964, as appeared on the face of the agreement, but rather some time in January, 1965. The support for this ground is stated to be the affidavit of Doris Farley (A. 24). Doris Farley, an employee in the unit, avers that she was present when the original of the said agreement was typed in the office of District No. 8 on or about January 21, 1965. She recalled Rosemary Mogge and Helen Spillane leaving the office of District No. 8 with the typed agreement to go to the office of plaintiff union on or about January 21, 1965 (A. 27).

The deposition of Doris Farley was taken on January 27, 1966 (A. 97-148). Her testimony regarding the averments of the affidavit was conflicting and confused (see A. 112-135). In it she stated that she never saw the agreement being typed (A. 134). She also testified that she saw the "completed" agreement in early January, 1965, either the first or second Thursday in the month (A. 115-118). When asked if she was sure that it was January 21, 1965 that Rosemary Mogge and Helen Spillane took the agreement to the office of plaintiff union, as stated in her affidavit, she said "I could be wrong . . ." (A. 134).

The second part of defendant's Motion alleged that if the Agreement was valid, either the complaint should be dismissed or the matter stayed pending arbitration (A. 24-26).

7. Subsequent Proceedings

On May 27, 1966 plaintiffs filed their Cross Motion for Summary Judgment seeking to establish the validity of the Agreement. It was supported by the affidavits of Rosemary Mogge and Sarah E. Keenan (A. 28-42).

The Motion and affidavits set out that the written collective bargaining agreement was a codification of the existing verbal agreements between the parties. That it contained the same terms and conditions of employment and economic benefits as had existed prior thereto. Further, that the Directing Business Representatives had the authority to execute same on behalf of the defendant employer. That there was no genuine issue as to a material fact regarding the validity of the Agreement (A. 28, 32-33, 36-38).

On April 21, 1967, the District Court rendered a Memorandum and Order (A. 42-44, Appendix A *infra* pp. 1a-1b). In it the following finding was made:

> "I find that there was a valid and enforceable contract between the parties. Defendant's previous contesting of the validity thereof I further find was not reasonable." (A. 43)

The Court then went on to find that there was "no waiver of a right to arbitration", by the defendant (A. 43). Based upon the rationale of *Drake Bakeries* v. *Local 50,* 370 U.S. 254 and *Packinghouse Workers* v. *Needham Packing Co.,* 376 U.S. 247, the Court granted defendant's motion to stay the proceedings pending arbitration.

Plaintiffs appealed from that part of the decision granting District No. 8's motion to stay the proceedings

pending arbitration. District No. 8 did not cross appeal from the decision finding the collective bargaining agreement valid. On December 26, 1967, the Court of Appeals affirmed the District Court's granting of the stay order. (Appendix B *infra* pp. 3a-7a).

It agreed that District No. 8's prior contesting of the validity of the agreement "was not unreasonable." The opinion added that District No. 8 had a "plausible ground for challenging the validity" of the agreement its prior refusal to arbitrate did not constitute a waiver of that right.

The Court held that the United States Arbitration Act is applicable to Section 301(a) cases. However, it found that District No. 8's prior refusal to arbitrate did not constitute "default" within the meaning of the Act. Petition for Rehearing was denied on January 23, 1968 (Appendix D *infra* p. 9a).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals affirming the District Court is in derogation of the common law and represents an improper extension of the rationale of *Drake Bakeries* v. *Local 50*, 370 U.S. 254 and other decisions of this Court, which if permitted to stand, will frustrate the national labor policy favoring arbitration of labor disputes. Furthermore the determination of the issues herein involve important questions of substantive law under Section 301(a) of the National Labor Relations Act regarding repudiations involving other than alleged breaches of no-strike provisions of collective bargaining agreements which should be determined by this Court.

It has been well established that repudiation of arbitration provisions of a contract by disclaiming the validity of the contract or denying the obligation thereof, cannot be retracted after a suit for damages has been filed in reliance thereof by the other party. The rule is set out in 6A Corbin, Contracts, Section 1443 (1962)[1] at pages 434-435:

> "Next, consider the effect of a repudiation or other breach by one party, its effect on the right of the other party and its effect on the right of the repudiator himself. Although one party cannot by himself

[1] This Court has recently commented on the applicability of this section to situations similar to that at bar, in *Vaca* v. *Sipes*, 386 U.S. 171, 185; 17 L. Ed. 2d 842, 855 (1967).

'rescind' a contract, he can wrongfully 'repudiate' it. What is the effect of his repudiation? To answer this, we must first interpret his expressions and determine the coverage of the repudiation. Suppose first that he repudiates the agreement to arbitrate itself. By such a repudiation he does not deprive the other party of his right to arbitration; and if the repudiator brings an action in breach of his valid arbitration agreement the defendant can defend on the ground that arbitration is a condition precedent, or under a statute can obtain a stay or an order to arbitrate, or can counterclaim for damages. *But such a repudiator has himself no right to arbitration. The other party can now bring his action in reliance on the repudiation, or otherwise change his position in reliance. Thereafter, the repudiator has no power of retraction and cannot insist on the remedy by arbitration.* If the alleged repudiator denies the existence or the scope of his alleged 'repudiation,' in the suit brought against him, and asks for a stay of the action and an order to arbitrate, the issue so raised would be for the courts to determine." (Emphasis supplied).

However, the Court of Appeals held that the rule in Corbin is only applicable where the repudiation is wrongful. It equated "wrongful repudiations" as those which are based upon grounds that are "patently untenable" or "clearly wrong" as it says existed "in the cases relied upon by plaintiffs", in support of the rule in Corbin (Appendix B, *infra* p. 5a). This tortured interpretation of repudiation as used by Professor Corbin is unsupported by either logic or the cases cited therein.

It is submitted the Seventh Circuit has confused wrongful refusals to arbitrate or nonperformance with repudiations of an entire agreement containing the arbitration provisions. Where the repudiation is of the entire agree-

ment the repudiator's right to arbitration is lost once the other party has changed its position in reliance on the repudiation.[2]

Bertero v. *Superior Court,* 30 Cal. Rptr. 719; 216 Cal. App. 2d 213, 218 (1963) cited by Professor Corbin, presented a factual situation almost identical to that at bar. It involved an employment contract which contained an arbitration clause. The employer, prior to the filing of suit, had written to the employee stating that the contract between them was invalid. Thereafter, the employee brought an action at law for damages for breach of contract. The defendant moved to stay the action pending arbitration. The court held that the defendant's letter, which declared the contract invalid, unenforceable and terminated, constituted such repudiation as to be a waiver of the defendant's right to demand arbitration.

In *Berry* v. *Carter,* 19 Kan. 135, 139 (1877), the defendant told the plaintiff prior to the institution of a suit for damages, that he would not recognize the contract between the parties. In commenting as to whether the plaintiff should have appointed arbitrators as spelled out by the contract, the court said at page 139:

> "The defendant, *by refusing to recognize the contract, waived his right to an arbitration, and at once gave authority to the plaintiff to sue him in any court* having the requisite jurisdiction *for the damages which plaintiff had sustained.*" (Emphasis supplied).

---

[2] However, the repudiator could have challenged the validity of the agreement by way of declaratory judgment, 28 U.S.C. 2201 *et seq.* See *El Paso Bldg. & Const.* v. *El Paso Chap. Assoc. Gen. Con.,* 376 F. 2d 797, 799 (1967).

In *Mapes* v. *Metcalf,* 10 N.D. 601, 88 N.W. 713, 717 (1901), the defendants disclaimed liability under a contract on the ground that it was a restraint against trade and void as against public policy. The court held that even though the defendants did not specifically refuse arbitration, since they denied all liability under the contract, they waived any right which they may have had to arbitration.

In *Pellicano* v. *Hartford Fire Ins. Co.,* 211 Minn. 314, 1 N.W. 2d 354, 355 (1941), the defendant insurance company had declared a policy void. Thereupon, the policyholder sued. To the defendant's assertion that the matter be arbitrated as provided in the policy, the Court said:

> "* * * The defendant, by repudiating the policy as void and thus denying any liability under it, lost any right it may have had to require arbitration * * *" (1 N.W. 2d 354, 355).

The rule that a defendant cannot seek arbitration after a suit in reliance on the repudiation is filed is also found in *Willett* v. *Smith,* 214 Mass. 494; 101 N.E. 1058, 1059 (1913); *Calhoun Denny & Ewing* v. *Pederson,* 85 Wash. 630; 149 P. 25, 26 (1915); *Cash* v. *Concordia Fire Ins. Co.,* 111 Minn. 162, 126 N.W. 524, 525 (1910); *Anderson* v. *M. Burg & Sons,* 170 Minn. 53; 212 N.W. 9, 11 (1927); and *Nachman* v. *Nachman,* 177 N.Y.S. 2d 323, 324, 12 Misc. 2d 551 (1958). See also *Lane, Ltd.* v. *Larus & Brother Co.,* 243 F. 2d 364, 367 (2nd Cir. 1957).

2. The findings of the Court of Appeals upon which its decision is based are wholly unsupported by any evidence. Although acknowledging that District No. 8 had refused to arbitrate on the ground that the collective

bargaining agreement was allegedly invalid, the Court found this not to be a repudiation of arbitration because the reasons for contesting the validity of the agreement were "not unreasonable." In so finding the Court relied upon the fact that the District Council did not approve the contract and that "Mrs. Mogge knew of the District's procedures requiring Council approval of matters of importance." This the Court held "was sufficient to raise a good faith doubt as to the validity of the agreement" (Appendix B, *infra* p. 5a).

It is submitted that whatever knowledge Mrs. Mogge had, or did not have, is irrelevant to the question of whether the By-Laws or Constitution of the defendant required the agreement to be approved by the Council. Furthermore, even if Mrs. Mogge had testified herein that she had this knowledge, her deposition was taken on December 9, 1965.[3] It is inconceivabe how her testimony can support a finding that District No. 8's denial of the validity of the agreement on April 15, 1965 was in good faith (A. 48).

Assuming *arguendo* that the defendant's prior refusal to arbitrate would not be a "wrongful repudiation" of arbitration if the grounds therefore were "not unreasonable", "patently untenable" or "clearly wrong", the evidence herein can lead to no other conclusion but a finding that the repudiation was wrongful. The primary ground for denying the validity of the contract was based upon a claim that the District Council had to ap-

---

[3] Mrs. Mogge's only testimony regarding this was that wage increases and expenditures were mentioned at District Council meetings (A. 33, 56).

prove the Agreement, and lacking such approval the Directing Business Representative did not have the authority to execute same (A. 23-27).

The affidavit of Mr. Russell Oddo stated that the By-laws of defendant union and Constitution of the International Union required such District Council approval. It was discovered that the By-law provision relied on was Article 2, Section 3, defining the duties of a Secretary at meetings (A. 185). There is no relationship between a requirement that a business agent shall act as a Secretary and keep accurate records, with a requirement that collective bargaining agreements must be approved by the District Council.

Equally without merit is Article 24, Section 11 of the International Union's Constitution which Oddo relied on as requiring District Council approval of the agreement (A. 183-184, 186-187). Again, it is inconceivable how any interpretation of a provision stating that illegitimate loaning or appropriating of funds, property or assets of a district lodge will subject the guilty party to disciplinary action, in any way can be strained into a requirement that contracts must be approved by the District Council before they become valid instruments.

As Mr. Oddo said in his deposition when asked again if these were the only provisions he was referring to in his affidavit: "Yes. This is one of these hurry-up deals. I was called in and referred to certain things in the spur of the moment on the way out." (A. 188).

It appeared that Directing Business Representatives secure their authority not from By-laws or the Constitution but rather from prior practice (A. 247). For some

twenty years, the Directing Business Representatives who executed the agreement herein, had been the chief executive officer of the District and had executed all nature of documents arising in the scope of his authority (A. 32-33, 36-37, 56, 155). See also 29 U.S.C. 185(b) and 185-(e) (Appendix E, *infra* pp. 10a-11a).

The only evidence presented regarding "customary practice" of securing District Council approval was with regard to wage increases (A. 190-191). However, there were no wage increases or other increased economic benefits in the agreement (A. 32, 37, 82-83).

The affidavit of Doris Farley regarding the time of the execution of the agreement, apparently inferring fraud on plaintiffs' part, was also urged in the Motion to Dismiss (A. 24). The District Court did not feel that it was even worthy of mentioning in its decision (Appendix A, *infra* pp. 1a-2a). The Court of Appeals only mentioned it in a brief footnote (Appendix B, p. 5a).

Moreover, District No. 8 prior to its alleging the invalidity of the contract had accepted the contract and operated thereunder. At the meeting of April 12, 1965 its representatives were well aware of the collective bargaining agreement between the parties and the rights set out therein. Mr. Glover stated at the time that it was District No. 8's position that the agreement between the parties permitted him to take the action he had taken (A. 34-35, 39, 66-68, 85-89). No better confirmation of District No. 8's acceptance of the contract validity can be found than in Glover's correspondence of April 13, 1965 acknowledging that the meeting of April 12th was in fact a grievance hearing within the

terms of the contract. At this point, District No. 8 had no difficulty in accepting the agreement between the parties (A. 19-20).

It was only after receipt of the request for arbitration that the defendant sent the letter of April 15, 1965 denying the validity of the agreement based upon "advise of counsel". (A. 21). Obviously, its counsel was familiar with the Supreme Court mandate requiring arbitration unless specifically excluded by the contract. *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 566-568; 4 L. Ed. 2d 1403 and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-584; 4 L. Ed. 2d 1409. Thus, the defendant had to reverse its field and deny the contract to avoid arbitration.

In two recent cases, this Court has had occasion to consider alleged repudiations of collective bargaining agreements. Both involved repudiations based upon claimed breaches of the no-strike provisions. In both this Court held that the arbitration provisions were still operative. *Drake Bakeries* v. *Local 50*, 370 U.S. 254, 261; 8 L. Ed. 2d 474, 479 (1962) and *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 251; 11 L. Ed. 2d 680, 683 (1964).

However, in *Drake Bakeries* the first knowledge that the union had of the dispute was the receipt of the complaint filed by the employer, and it promptly asserted its arbitration rights. In *Needham Packing Co.* the union seeking to compel arbitration had previously sought arbitration and the employer had resisted. Although two months expired between the occurrence and

the submission of the two grievances to arbitration there was no change in position by the employer.

To permit the defendant to stay this action for damages would be an anomalous ruling repugnant to the common law and an improper extension of the rationale of *Drake Bakeries* and *Needham Packing Co.* Moreover, it is submitted that the national labor policy of encouraging arbitration of labor disputes would be defeated by permitting a party to a labor contract, when called upon to live up to its bargain, disclaim the contract and repudiate its arbitration provisions. The aggrieved party is thus forced to bear the expense of litigation, with the only reprimand for capricious and arbitrary refusal being submission to arbitration, which it had wrongfully elected to disregard. Indeed, this national policy would be frustrated by permitting a party to flaunt its arbitration agreement and escape without penalty.

3. To resolve the conflict and confusion between the Circuits as to whether or not the United States Arbitration Act applies to suits arising under Section 301(a) of the National Labor Relations Act. If so, to determine whether the respondent is in default in seeking arbitration within the meaning of Section 3 of the Act. If not, to determine the applicable standards under Section 301(a) substantive law for seeking arbitration after having previously refused same, and whether the respondent herein may do so.

There is a conflict as to whether or not the term "contracts of employment" in Section 1 of the Arbitration Act applies to collective bargaining agreements between a union and an employer, which has not been resolved by this Court. The Fifth Circuit, in *Lincoln Mills*

of Alabama v. *Textile Workers Union,* 230 F. 2d 81, 86 (5th Cir. 1956) Certiorari granted 353 U.S. 448, 1 L. Ed. 2d 972 (1957) held that a collective bargaining agreement was a "contract of employment" within the meaning of Section 1 of the Arbitration Act and as such excluded from the application of the Act. In reversing the Fifth Circuit and ordering arbitration, this point was not discussed.

A companion case to *Lincoln Mills,* decided on the same day, is *General Electric Company* v. *Local 205, etc.,* 233 F. 2d 85, 98 (1st Cir. 1956) Certiorari granted 353 U.S. 547, 1 L. Ed. 2d 1028. That arose from the First Circuit, which had decided that the collective bargaining agreement was not a "contract of employment" within the exclusionary provision of Section 1. In affirming the First Circuit's reversal of the District Court, and ordering arbitration this Court indicated that it was following "in part a different path than the Court of Appeals", though reaching the same result. The confusion which resulted in the First Circuit as to whether or not this language meant that the Arbitration Act was inapplicable to Section 301(a) cases is shown by its subsequent opinion in *Local No. 149* v. *General Electric Company,* 250 F. 2d 922, 927 (1st Cir. 1957); cert. denied 356 U.S. 938; 2 L. Ed. 2d 813.

Drake Bakeries, Inc. v. *Local 50,* 287 F. 2d 155 (2nd Cir. 1961); 294 F. 2d 399 (2nd Cir. (1961); Certiorari granted 370 U.S. 254, 8 L. Ed. 2d 474 (1962) arose under Section 3 of the Arbitration Act. In affirming the District Court's granting of the motion to stay the proceedings this Court failed to comment on the applicability of the Arbitration Act. However, there was a specific finding that the Union in *Drake Bakeries* was

not in default in seeking arbitration (370 U.S. 254 at 266).(4)

The Seventh Circuit from which this case rises holds that the Arbitration Act is applicable to 301(a) cases *Pietro Scalzitti* v. *Int'l. Union of Operating Engineers,* 351 F. 2d 576, 579-580 (7th Cir. 1965). The Court below applied the Act herein (Appendix B, *infra* p. 7a). It held however, that the defendant is not in default within the meaning of Section 3 of the Act. It concluded that the definition of default set out in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.,* 126 F. 2d 978 at 989 (2nd Cir. 1942) applied only to prior wrongful refusals to arbitrate, although the moving party in *Kulukundis* had never previously been requested to arbitrate.

The mandate of *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957) is that federal substantive law is to be applied in cases arising under Section 301(a). That body of law is being created and applied with ever increasing frequency. This Court is cognizant of the multitude of cases involving a determination of arbitration issues being filed under Section 301(a). The question of whether the United States Arbitration Act is applicable should be settled.

Further, assuming the Act to be applicable, a working definition of default should be enunciated to assist the lower courts in determining the issue as in the case at bar. Even if the Act is found not to apply to cases arising under Section 301(a) guideposts should be set up for the substantive law being fashioned daily throughout the courts of this land.

---

(4) See also the cases collected in 64 ALR 2d 1336, 1343 to 1348.

CONCLUSION.

For the important reasons assigned, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

BARNABAS F. SEARS,
JAMES N. KOSMOND,
33 N. LaSalle Street,
Chicago, Illinois 60602,
Attorneys for Petitioners.